September 18, 2019

Dear Representative:

Consumer Reports strongly urges you to support H.R. 1423, the Forced Arbitration Injustice Repeal (FAIR) Act.

The increasing use of forced arbitration is undermining the rule of law as it applies to corporate conduct. It is preempting the ability of our legal system to hold corporations accountable. This is a spreading injustice in the marketplace, in which corporations are forcing consumers, workers, and small family businesses to relinquish fundamental legal protections as a pre-condition for obtaining a product or service, or a job. It is time to correct this harm by approving H.R. 1423.

Forced arbitration is being slipped into the fine print of standard-form contracts and terms of service that are presented to consumers as a take-it-or-leave-it pre-condition for obtaining such basic products and services as a credit card, bank loan, student loan, apartment lease, mobile phone, video subscription, or nursing home admission.

Congress never intended this. The Federal Arbitration Act was enacted in 1925 to give *businesses* – with relatively equal bargaining power – options for resolving their *business* disputes. But ill-conceived Supreme Court rulings[1] have warped that statute into a weapon that is being used against people who have *no* bargaining power. There is no meaningful sense in which these people have "agreed" to give up bedrock legal protections. Their only "choice" is to decline the product or service – or job – altogether. Many times, that is just not a practical option. And it is never fair.

When forced on consumers -- and on workers and small businesses -- in this way, the arbitration process, designed by corporations and their lawyers, inherently tends to be one-sided, tilted to favor the corporation that has arranged for it. The process is a "black hole," where the law does not apply, there is no right of appeal, and too often, the outcome is required to be kept secret. The arbitrator, chosen by the corporation, has a skewed incentive to heed the interests of the corporation, in hope and expectation of repeat business. The corporation can also choose where the arbitration will take place, what the rules will be, and how the costs will be borne. There are none of the fundamental safeguards that are the hallmarks of a fair, impartial, and accessible court proceeding to protect people and hold accountable a corporation that has committed widespread abuse, or has marketed an unsafe product or service.

[1] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DirectTV Inc. v. Imburgia, 136 S. Ct. 463 (2015); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

Justice Ginsburg has stated that the Court's forced arbitration rulings "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws."[2]

In an interview with the New York Times, former Federal District Judge William G. Young, appointed in 1985 by President Reagan, was even blunter: "Ominously," he said, "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[3]

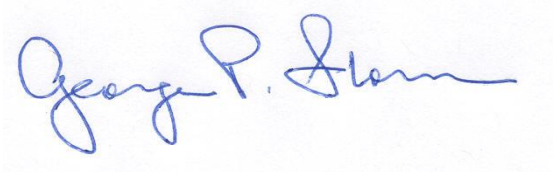
Contrary to the claims of forced arbitration defenders, the FAIR Act would in no way "ban" arbitration when it is really agreed to. It would stop *forced* arbitration from *being imposed* as a pre-condition for obtaining a product, or for obtaining or continuing service or employment, and closing off access to the courts for consumer law claims, employment law claims, civil rights claims, and antitrust claims by small businesses. Once a dispute actually arises, and the stakes are clear, consumers (or workers or small businesses) could freely choose arbitration, if they determine it to be actually fair, and to actually be a better option for them than the courts.

Isolated pledges by individual corporations to forswear forced arbitration in specific contexts are no substitute for a comprehensive law to prohibit it. Indeed, those isolated pledges reflect a recognition that forced arbitration is fundamentally unfair and needs to stop.

We hope you will lend your support to correcting this spreading injustice by voting in favor of the FAIR Act.

And we urge you vote against the amendment by Representative Jordan that would nullify arbitration procedures in a collective bargaining agreement negotiated by a union and approved by its members. This kind of arbitration procedure, a longstanding feature in labor relations, is far different from forced arbitration that the bill prohibits. It is like the business-to-business arbitration agreements, among informed parties of relatively equal bargaining power, that the Federal Arbitration Act was designed to facilitate, and that the bill would preserve. This amendment would not advance the purposes of the bill.

Sincerely,



George P. Slover
Senior Policy Counsel
Consumer Reports

---

[2] DirectTV Inc. v. Imburgia, 136 S. Ct. at 477 (Ginsburg, J., dissenting).
[3] Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, NY Times, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.